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No. 03-781

IN THE

Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

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The Louisiana Association of Criminal Defense Lawyers hereby respectfully moves this Court for leave to submit the attached *Amicus Curiae Brief* on behalf of Petitioner in this matter, Jimmy Doug Shelton. *Amicus* is filing this motion because of the rush of the holidays, and other engagements of counsel, counsel has been unable to secure written permission from the Government to participate in this matter as *amicus*.

As more fully explained at pages 1 & 2 of the attached brief, the Louisiana Association of Criminal Defense Lawyers is a non-profit organization organized and operated by the members of the Louisiana State Bar specializing in the defense of criminal cases.

The attached *Amicus Brief* is neither repetitive nor redundant of the arguments raised by Petition in his *Petition*. Instead, the *Amicus Brief* focuses on the privacy issues which, while mentioned in the *Petition*, were not fully illuminated and emphasized in that *Petition*. LACDL believes that this *Amicus Brief* will assist the Court in determining the substantial issues of Constitutional law that weigh in favor of granting Petitioner's request for certiorari.

Accordingly, Louisiana Association of Criminal Defense Lawyers moves this Court to grant it leave to file the attached brief.

Respectfully submitted,

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INTERESTS OF THE AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers is a non-profit organization organized and operated by the members of the Louisiana State Bar specializing in the defense of criminal cases.[1] As noted in its literature, membership in the LACDL "means joining your fellow defenders in the struggle for liberty, individual rights, the basic principle of due process, and the fundamental right to a fair trial." Founded in 1975, the organization currently has four hundred (400) members and is devoted primarily to the support and edification of the criminal defense bar in the State of Louisiana.

The LACDL has a significant interest in the granting of the *Petition for Certiorari* filed in this matter by Jimmy Doug Shelton. As noted in the *Petition* filed by Mr. Shelton, the instant case questions the extent to which the Government can conduct "consensual searches" of an individual's home where the party giving consent has no ownership in the property being searched and is estranged from the property by virtue of having terminated the relationship giving him access to the property. Although this inquiry focuses on four (4) lines of this Court's Fourth Amendment jurisprudence, *see Petition for Writ of Certiorari*, there exists no prior decision from this Court conclusively determining the extent to which such consent is effective. The *res nova* nature of this issue in this Court's jurisprudence has created significant confusion amongst the lower courts and requires resolution by this Court. Because any decision of this Court will have watershed ramifications on the extent to which government searches are permitted, and because this Court's consideration of the Fifth Circuit's opinion in the *Shelton* matter

1. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief.

will have substantial impact on Louisiana criminal practitioners practicing in the Fifth Circuit, LACDL wishes to participate in this matter.

SUMMARY OF THE ARGUMENT

This case presents the question of whether a criminal defendant surrenders his reasonable expectation of privacy to an estranged wife—thus permitting the wife to "consent" to a search by herself and federal agents of a former marital domicile owned and solely occupied by the defendant—where the defendant gives restricted and limited access to that house to the wife for purposes of removing the wife's belongings. The "right of access" test employed by the Fifth Circuit to find consent in this situation valid violates two aspects of the right to privacy—(a) the Fourth Amendment's protection of the sanctity of a man's home; and (b) the right of substantive due process guaranteeing individuals the right to manage their personal relationships free from unwarranted governmental intrusion. The inability of that test to adequately safeguard the rights of criminally-accused defendants becomes manifest when the Court considers the inconsistencies between the Fifth Circuit opinion *sub judice* and the recent Eleventh Circuit opinion in *United States v. Backus*, 349 F.3d 928 (11th Cir. 2003). For these reasons, this Court should accept certiorari and review the decision of the Court below.

The right to privacy has many aspects, *inter alia*, the right to be free of unwarranted intrusion into one's home and the right to manage one's own interpersonal relationships in a manner conforming to one's own personal beliefs. In the instant matter, the Fifth Circuit opinion undermines both of these fundamental rights. It ignores the reasonable expectation of privacy that Jimmy Shelton had in the home solely occupied him, solely owned by him, and from which his wife had irrevocably left weeks before the commencement of the searches

at issue. Compounding this refusal to recognize the sanctity of Shelton's abode, the decision further diminishes Shelton's right to privacy solely because of the manner in which he acted towards his estranged wife, a diminution that violates Shelton's right to freedom from unwarranted intrusion into the interpersonal relationships significant to him. These twin violations arose largely due to the lack of any significant guidance from this Court as to the criteria to be applied in third-party consent cases in which the consenting party is the estranged wife of the accused. They therefore signal a need for this Court to provide some standards for lower courts to follow in such cases.

That this need is acute is demonstrated by the recent Eleventh Circuit decision in *Backus*, *supra*. Significant about the *Backus* decision is the fact that it arrived at a result identical to that in the instant matter by holding that the actions taken by Backus to protect his privacy —actions the Fifth Circuit chided Shelton for not taking—were evidence that Backus had surrendered any expectation of privacy he may have had in his home! That one court could find inaction indicative of a lack of privacy, while another could find that actions gave the same indication, exemplifies the confusion in the lower courts caused by the lack of necessary guidance from this Court. This Court should therefore intervene and enunciate standards sufficient to safeguard the privacy rights embodied in the Fourth, Fifth and Fourteenth Amendments.

ARGUMENT

LACDL intervenes in this matter as *amicus curiae* to underscore the extent to which the decision of the United States Fifth Circuit Court of Appeals in this matter has eviscerated the right of privacy undergirding the Fourth Amendment's prohibition against unreasonable searches and seizures. Reaching its decision in the instant case, the Fifth Circuit held that the limited rights of access to his house that Jimmy Doug Shelton gave to his estranged wife eliminated any expectation of privacy he might have had in that house, a house searched by the Government through the consent and with the assistance of Shelton's estranged wife Cheryl. *United States v. Shelton*, 337 F.3d 529, 536-37 (5th Cir. 2003). This holding implicates two (2) significant aspects of the right to privacy—the right of an individual to maintain a degree of privacy in his or her home and the right of individuals to conduct their personal lives and personal relationships with a veil of privacy untarnished by state action. Because the decision of the Fifth Circuit treats the privacy issue in a manner inconsistent with prior jurisprudence, and does so in a fashion that undermines the substantial privacy interests supporting the Fourth Amendment's exclusionary rule, this Court should grant certiorari and review the decision of the Fifth Circuit.

I. THIS CASE PRESENTS SIGNIFICANT ISSUES OF CONSTITUTIONAL LAW CONCERNING THE SCOPE OF THE RIGHT TO PRIVACY.

Although it comes to this Court in the context of a criminal case, the instant matter raises substantial issues of constitutional law concerning the extent to which the right of privacy protects a person's interests in his home and in the interpersonal relationships significant to that person's life. This Court has previously recognized the fundamental nature of this right of

privacy. *See generally Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-27 (1992); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) ("This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.") The essential question raised by the Fifth Circuit opinion in this case is whether or not Jimmy Doug Shelton surrendered the privacy interest he possessed in a home solely owned and occupied by him when he granted his estranged wife limited access to the home, access granted for the limited purpose of eliminating the material ties that bound him to her. The decision reached by the Fifth Circuit in the instant case undermines both the right of privacy Shelton possessed in the sanctity of his home and the right of privacy Shelton possessed in his ability to sever his relationship with his estranged wife in a manner free from governmental oversight or intrusion. This Court should now review that decision and articulate clear standards that will safeguard against future intrusions on the fundamental right to privacy.

A. *The Fifth Circuit decision undermines that aspect of the right to privacy that safeguards the sanctity of the home.*

Fundamental to the right to privacy is the privacy interest that a person maintains in residences solely owned and occupied by them. This Court has previously recognized "the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed." *Payton v. New York*, 445 U.S. 573, 582 (1980). The lower court decision in the instant matter fails to adhere to standards sufficient to circumscribe that governmental intrusion and is therefore inconsistent with the fundamental nature of the right to privacy in the home.

The Fourth Amendment recognizes that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. As a means of safeguarding this freedom, "the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). The exclusionary rule permits individuals whose property or person has been subject to an unreasonable search and seizure the ability to demand the exclusion at trial or sentencing of any and all evidence unlawfully obtained through the unreasonable search. *See generally Weeks v. United States*, 232 U.S. 383, 398 (1914). Thus "the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents." *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990). To permit otherwise would be to reward law enforcement for the violation of fundamental rights of privacy underlying the Fourth Amendment.

Although the exclusionary rule has been limited to searches and seizures occurring in instances and locations in which a person has a "reasonable expectation of privacy", *see Katz v. United States*, 389 U.S. 347, 351 (1967), this Court has previously recognized that the "reasonable expectation of privacy" reaches its zenith within the confines of a person's domicile. "For this reason, warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). The reasonableness of this expectation of privacy derives from the high regard in which this Court has placed the sanctity of a person's home in permitting the exclusion of individuals

except upon the express wish of the homeowner. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). *See also Wilson v. Layne*, 526 U.S. 603, 610-11 (1999) ("the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest"); *Silverman v. United States*, 365 U.S. 505, 512 (1961) ("A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.") Therefore, once a man has retreated into his home and signaled his intent to exclude others from complete access to that home, the right to privacy respects that decision and precludes the government from taking actions in violation of that right.

To find a valid surrender of that fundamental right of privacy requires a showing by the government that the owner of a dwelling somehow abdicated his right to exclude others from his home and in effect gave them joint authority to make decisions relative to that home. "As we stated in *Matlock, supra*, common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. The burden of establishing that common authority rests upon the State." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Common authority extends beyond simple property ownership, but it retains in essential part the requirement that the owner of the property in question have surrendered his or her unilateral right to control and use of the property being searched. The presence of common authority exists in the presence of

> mutual use of the property by persons *generally having joint access or control for most purposes*, so

> that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 172 (1974) (emphasis added). Because of the substantial constitutional rights involved, the burden on the government of proving common authority is rigorous, and cannot be satisfied absent a showing that a person had a virtually blank mandate to enter an abode at will and make decisions relative to the property.

By focusing on the consent given by Mrs. Shelton to the searches at issue in the instant case, the Fifth Circuit placed a burden of proof on the Government insufficient to safeguard the constitutional privacy protections contained in the Fourth Amendment. No evidence was presented to show that Mr. Shelton gave Mrs. Shelton permission to enter his home for any purposes other than the retrieval of her mail and the removal of her personal possessions from the home. This limitation on Mrs. Shelton's access rights falls far short of the requirement that she have "control for most purposes" over the house and enjoy completely unfettered "joint" access to that house. Mr. Shelton had expressly limited the ability of Mrs. Shelton to conduct free-ranging excursions into his home. He had therefore erected a barrier between Mrs. Shelton and that home sufficient to create a zone of privacy that Mrs. Shelton and the government were required to respect.

Instead, the Government used Mrs. Shelton's "consent" to a search of the premises to discover and collect evidence through methods wholly unrelated to the authority Mrs. Shelton had with respect to the house. Mrs. Shelton accompanied the Government agents through Mr. Shelton's house and showed them a number of hiding places used by Mr. Shelton to store personal,

confidential documents that he intended to keep from the general public. Mrs. Shelton indeed videotaped portions of the house where the Government collected evidence and did herself conduct an extensive search of the premises to aid the Government in collecting evidence to be used against Mr. Shelton. None of these activities bore any relation to the limited retrieval and removal authority granted Mrs. Shelton. They do not fit within the limited authority given to Mrs. Shelton to enter Mr. Shelton's house. Because the Government's right to search is derivative of the authority granted to Mrs. Shelton, and Mrs. Shelton had no authority to enter Mr. Shelton's home for any purpose other than the retrieval of mail and personal belongings, the Government had no right to search the home.

By equating the limited rights of access given to Mrs. Shelton with "joint access or control for all purposes", the Fifth Circuit imposed an insufficiently heavy burden of proof on the Government to show the consensual nature of the search. That unduly lax standard undermines the conceded privacy interests Mr. Shelton attempted to carve out in the matrimonial domicile solely owned and solely occupied by him. This Court should grant certiorari in this matter to insure that future analyses of the consent requirement comport with the strong protection of the right to privacy inherent in this Court's prior precedent.

B. *The Fifth Circuit decision is inconsistent with this Court's precedent concerning the right to privacy as it exists in interpersonal relationships.*

Although the focus of the Fourth Amendment centers on the right to privacy as it exists in the home, the instant case also presents concerns over the right to privacy as it exists in interpersonal relationships. The Fifth Circuit found Shelton to have yielded his right to privacy to his estranged wife based on the manner in which he acted towards her after she left the matrimonial home. Using this conduct as a basis for determining

the constitutional rights afforded Shelton seriously infringes on the right to privacy he has in regards to his family and the dissolution of his marital relationship. Because that infringement is inconsistent with this Court's protection of the family relationship, this Court should accept review of this matter to remedy that inconsistency.

This Court has often recognized that the rights guaranteed by the Fourteenth Amendment's incorporation of the Fifth Amendment's right to due process include the right "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). The Court has further delineated that such freedoms fall within the ambit of the right to privacy necessary for the preservation of ordered liberty under the Constitution. "We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Although *Griswold* categorized the right to privacy as "penumbral", subsequent precedent from this Court delineates that the right—especially as applied to interpersonal and familial relationships—is fundamental. *See generally Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-27 (1992) ("Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, child rearing, marriage, and contraceptive choice.") The Court has extended this right to encompass the

right of indigents to obtain a divorce, *see Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) ("in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship"); the right of women to obtain abortions without undue burden on that right, *see Roe v. Wade*, 410 U.S. 113, 153 (1973), and—most recently; the right of homosexuals to engage in sexual conduct in the privacy of their own home. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.") These decisions establish the rule that, in the context of an adult's most fundamental relationships with fellow adults—whether those relationships be traditional or non-traditional—the government has no right to dictate a specific course of conduct in those relationships absent a violation of a valid law supported by a compelling state interest.

This Court enunciated the policy behind this dictate in *Casey*, *supra*. Observing the necessity of free communication and independent undertaking as to individual relationships, the *Casey* Court found that:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851. *Accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984) ("Without precisely identifying every

consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs"); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.") Just as the right to enter into marriage is considered fundamental, so the right to exit a marriage no longer considered viable is considered to be one of the areas of human endeavor into which the government should not intrude.

> Because one has a fundamental right to marry, *see Zablocki*, 434 U.S. at 386, 98 S. Ct. 673, which includes the right to divorce so that one can remarry, *see Boddie*, 401 U.S. at 376, 91 S. Ct. 780, a statute whose only purpose is to hinder this right, even if it does not actually, in its effect, 'interfere directly and substantially with the right to marry,' *Zablocki*, 434 U.S. at 387, 98 S. Ct. 673, would not be supported by a legitimate government purpose.

Aleman v. Glickman, 217 F.3d 1191, 1204 (9th Cir. 2000). The marital relationship is so basic and personal that the government cannot place undue burdens on the entry into, conduct in and exit from the relationship, absent a compelling governmental interest.

The Fifth Circuit decision in the instant matter is inconsistent with this stated policy. In the instant case, the lower court calculated the "reasonable expectation of privacy" afforded Shelton in his marital home based on the means by which he chose to end his relationship with his wife, Cheryl. *See Shelton*, 337 F.3d at 537. It came up with a hypothetical list of actions it

deemed a prudent spouse would take if his wife left him and determined that, because the actions taken by Shelton in the wake of his wife's departure did not conform to that list, he would be afforded a lesser standard of privacy than individuals whose actions did so conform. The "right of access" test that emerged from this comparison hinged on whether Shelton acted towards his estranged wife in a manner consistent with that which the court believed a spurned husband should act. *See, e.g., id.* ("Indeed, as an accused philanderer, Shelton might have done well to heed the admonition of the playwright William Congreve regarding a woman scorned.") Yet this list of action items failed to take into account the very intimate and personal details of the specific relationship between Shelton and his wife, it failed to discern whether or not the actions taken by Shelton were appropriate given the context of that relationship, and it failed to take into account the right of the Sheltons to separate in the way most appropriate to their personal beliefs and ideals. Society cannot enforce conformity in the context of an interpersonal relationship and cannot hinge a party's constitutional freedoms on the extent to which that party conforms to a specific beliefs system. *Compare, e.g., Lawrence*, 123 S. Ct. at 2472

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

To do so would violate the substantive due process concerns, rooted in the guarantees of privacy of the Fifth and Fourteenth Amendments, so essential to the concept of ordered liberty.

In the instant case, the Fifth Circuit limited Shelton's rights to privacy based solely on the extent to which the breakup of his marriage conformed to what the court viewed to be accepted societal beliefs. Yet the court cannot enforce its views as to how Shelton should have acted towards his ex-wife absent either a compelling governmental interest or some evidence showing that his conduct towards his ex-wife violates valid state or federal law. *See Casey*, 505 U.S. at 929; *California v. Ciraolo*, 476 U.S. 207, *226 n.11 (1986) (While "the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there", the Fourth Amendment requires a warrant to intrude on that privacy). Neither has been demonstrated in the case *sub judice*. Therefore, the Fifth Circuit improperly intruded into the personal and private relationship between Shelton and his wife to determine the extent of his right to privacy in their marital domicile, a method of adjudication impermissible under the Fifth and Fourteenth Amendments.

II. THE DECISION OF THE FIFTH CIRCUIT CREATES A CIRCUIT SPLIT REQUIRING RESOLUTION BY THIS COURT.

That the "right of access" test adopted by the Fifth Circuit is unworkable, and is insufficiently vigorous to protect the right to privacy as intended by the Framers, becomes pellucidly clear when compared with the subsequent decision of the Eleventh Circuit in *United States v. Backus*, 349 F.3d 1298 (11th Cir. 2003). While the Fifth Circuit in the instant case found that Shelton failed to properly safeguard his home from intrusion by Cheryl, the Eleventh Circuit in *Backus* found that Backus had surrendered his expectation of privacy because he took many of the actions the Fifth Circuit chastised Shelton for not taking! That two courts could reach such inconsistent results exemplifies the unworkability of the standards currently used to measure for the reasonable expectation of privacy a criminal defendant

has in his home. Resolution of the confusion created by this lack of standards requires this Court's intervention.

In *Shelton*, the Fifth Circuit noted that "the only rule that emerges [from cases involving third-party consent to search] is that the validity of a search grounded in third-party consent requires an intensely fact-specific inquiry, and that slight variations in the facts may cause the results to vary." *Shelton*, 337 F.3d 529, 535 (5th Cir. 2003). Taking this lack of bright-line rules as an invitation to fashion its own criteria based on the facts before it, the lower court began with the notion that "third party consent presumably extends the capacity to give consent to individuals to whom the one with the privacy interest has already substantially ceded his expectation of privacy." *Id.* at 535. The court then found that Shelton had failed to take certain precautions against intrusion and had thus ceded his expectation of privacy to Cheryl:

> Had he truly wanted to limit her access to these purposes only, Shelton could have revoked Cheryl's security code, changed the locks, and set up an appointment for her to pick up her things while he was present at the house. Just as Shelton put aside Cheryl's mail, he could have collected her personal belongings for her to pick up at one time. He could even have left her mail outside the house or taken it to his office and given it to her sister, who worked there.

Id. at 536-37. Finding that Shelton took none of these precautions, the court held that "Shelton never altered his position toward Cheryl's use of the house after she moved out, and that his low expectation of privacy relative to her continued unchanged." *Id.* at 537. This finding permitted it to condone at least nine (9) searches of Shelton's house by Cheryl Shelton, and seizures of evidence from that house, all at the behest and

under the direction of the Government. The primary purpose of the visits was to further the Government's criminal investigation. The lower court permitted these searches and seizures based on its belief that Shelton's failure to take the actions enunciated in the opinion showed that he had ceded any privacy expectation he might have in the domicile solely owned and occupied by him to his estranged wife.

Yet the undertaking of those very actions to safeguard one's privacy can themselves be taken as indicia of a low expectation of privacy in the property subject to the actions. The Eleventh Circuit's decision in *Backus* amply demonstrates this fact. In *Backus*, the defendant husband—a convicted felon—had abused his wife for many years and that abuse ultimately led her to flee the marital domicile. *Backus*, 349 F.3d at 1300-01. Although Backus changed the locks on the marital domicile after his wife left, he continued to write her to demand that she return, and he left her as co-owner of the house occupied by the couple during their marriage. *Id.* at 1303. Six months after her departure from the marital domicile, Mrs. Backus contacted ATF agents and led them to the house, consented to a search of its contents, and accompanied the officers on a search that yielded four (4) weapons and 4,000 rounds of ammunition. *Id.* Charged with illegal possession of a firearm while a convicted felon, Backus argued on appeal that his wife's lengthy absence from the marital home made it reasonable for him to expect that she would never return, thus giving him a reasonable expectation of privacy in the home. *Id.* The Eleventh Circuit found that Backus possessed no expectation of privacy in the home *vis-à-vis* his wife because he had taken many of the actions that the Fifth Circuit chided Shelton for *not* taking!

> On a more factual note, if Backus truly did not expect his wife to return, it is hard to understand why he would have felt it necessary to change the deadbolt

> lock on the door to prevent her key from working in it. Moreover, in the letters Backus sent to his wife through her family near the end of the six-month period, he was still insisting that she return, albeit in his usual less than diplomatic terms: "You had better get your ass over here and help;" "Don't fear knocking on my door, fear what's coming if you don't;" and "I am going to do something if you don't get your ass over here & grow the fuck up." The point here is that it is not clear that Backus did not expect his wife to return and exert authority over their jointly owned townhouse, but it is clear that any expectation he may have had that she would never do so was an unreasonable one. In the language of the Supreme Court's *Matlock* decision, given the circumstances it is "reasonable to recognize" that Mrs. Backus had "the right to permit the inspection in [her] own right" and that her husband "assumed the risk" that she might permit the townhouse to be searched.

Id. at 1304. Ironically, the Eleventh Circuit cited *Shelton* as "support" for its belief that Backus' actions relative to his home and his wife showed that he lacked a reasonable expectation of privacy in his home. *Id.* at 1305. Given that the two (2) cases reached the same result by interpreting facts in a manner diametrically opposed to one another, the fact that the Eleventh Circuit could find its decision in harmony with that of *Shelton* demonstrates the failure of contemporary standards for third-party consent to provide courts with adequate criteria for measuring the reasonableness of a search based on the existence of third-party consent by an estranged wife.

The diametric opposition of these two (2) cases becomes apparent when one considers the facts highlighted by the two (2) courts for determining whether the defendants in *Backus* and *Shelton* had ceded their expectation of privacy in their homes to their estranged wives. In *Shelton*, the Fifth Circuit held that the failure to change the locks on the house or to revoke Mrs. Shelton's security code showed a failure to safeguard the premises against intrusion—the Eleventh Circuit in *Backus* found that the changing of the locks showed an expectation that the wife would return. Shelton strictly restricted the activities for which his wife could return, yet Backus demanded that his wife return unconditionally—in both instances, the courts found that the defendant "held no subjective expectation of privacy toward her at any time, either before or after her move." *Shelton*, 337 F.3d at 537. *Compare*, *Backus*, 349 F.3d at 1304. Although Shelton's wife had been gone but a few when his wife began leading FBI agents to his home, and Backus' wife had been gone six (6) months, the Eleventh Circuit found any distinction based on time to be irrelevant. *Backus*, 349 F.3d at 1305 ("One month or six, Mrs. Backus still had enough common authority over or sufficient relationship to the premises to consent to a search of it.") The only clear rule arising from these cases, if such it can be characterized, is that the "fact-specific" criteria used for determining the reasonableness of third-party consent to search depends less on the facts presented than on the *gestalt* reaction of individual courts to those facts.

If left without guidance, the decisions of the lower courts will erode the right of privacy in a manner inconsistent with its Constitutional origin. The logistical breakdown of the lower court system in evaluating the reasonableness of third-party consent in cases involving estranged spouses or partners lies in the attempt by lower courts to place a mathematical matrix over individual conduct and to determine whether or not that conduct

safeguarded the privacy an individual defendant expects in his home. The right to privacy simply does not work this way—because the right is so personal, and its application in interpersonal relationships cannot be confined to a specific yardstick, the Government's proper office is to avoid situations where it must pass judgment on an individual's actions in relation to his spouse, partner or family. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) ("While the outer limits of the right of personal privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships and child rearing and education"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.") The decision reached by the Fifth Circuit in the instant matter determines the amount of constitutional rights a criminal defendant has based on the manner in which that defendant treats the breakup of his relationship with his spouse. It therefore measures a criminal defendant's right to privacy by passing judgment on the interpersonal relationship extant between the defendant and his spouse. Such action intrudes on a portion of private conduct in a manner wholly inconsistent with the Framer's intent in creating the implicit, albeit fundamental, constitutional right of privacy. This Court should therefore intervene in this action and create standards that more vigorously shield defendants like Shelton and Backus from unwarranted intrusions into their personal relationships by government investigation.

CONCLUSION

For the foregoing reasons, and for those expressed in the *Petition for Certiorari* filed in this matter, the Louisiana Association of Criminal Defense Lawyers moves this Court to grant Jimmy Doug Shelton's *Petition*.

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